Supreme Court, U. S.
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IN THE

Supreme Court of the United States

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE and GROUP INSURANCE COMPANY OF MICHIGAN,
Petitioners

vs.

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE and HENRY SWIFT, individually and on behalf of all persons similarly situated,
Respondents,

No. 78-1542

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE and GROUP INSURANCE COMPANY OF MICHIGAN, **Petitioners** **vs.** **DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRY-SOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE and HENRY SWIFT, individually and on behalf of all persons similarly situated,** **Respondents,**	**No. .....**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Automobile Club of Michigan, Detroit Automobile Inter-Insurance Exchange, Motor Land Insurance and Group Insurance Company of Michigan, Petitioners herein, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in the above case on March 12, 1979.

OPINIONS BELOW

The District Court for the Eastern District of Michigan did not issue an opinion in connection with its order requiring petitioners to assemble their employees for administration of a questionnaire devised by respondents. The order of the district court, which is printed in the Appendix at pp 1a-3a, is reported unofficially at 18 FEP Cases 970. The order of the Court of Appeals for the Sixth Circuit which dismissed petitioners' appeal from the order of the district court is not yet reported. The order of the Court of Appeals is printed in the Appendix at pp 4a-5a.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit dismissing petitioners' appeal was entered March 12, 1979. The jurisdiction of this Court is invoked under 28 USC §1254(1). Alternatively, jurisdiction of this Court is invoked under 28 USC §1651. Petitioners hereby move, under Supreme Court Rule 31, for leave to file a petition for issuance of a Writ of Certiorari under 28 USC §1651(a).

THE QUESTION PRESENTED

Do the Federal Rules of Civil Procedure authorize a federal district court to order, as part of pretrial discovery in an action alleging employment discrimination, a defendant to assemble 1400 of its employees on its premises during working hours, to answer a detailed two-page questionnaire which inquires into employees' living arrangements, financial affairs and other private matters and which contains a misleading introductory statement, drafted by the district court, designed to coerce employees into answering the questionnaire?

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Rules of Civil Procedure 33 and 34

The rules involved are Rules 33 and 34 of the Federal Rules of Civil Procedure. Because of the length of these provisions, their pertinent text is set forth in the Appendix at pp 6a-9a.

STATEMENT OF THE CASE

Petitioners are a non-profit organization, a reciprocal insurance exchange and two insurance companies, all organized under the laws of Michigan. Respondents, who purport to represent black employees and applicants for employment of petitioners, filed their initial complaint against petitioners in December 1972. The complaint, which has been twice amended, asserted rights under Title VII of the Civil Rights Act of 1964 (42 USC §2000e, *et seq.*) and the Civil Rights Act of 1866 (42 USC §1981).

Respondents filed their second amended complaint on October 20, 1976. As did the two earlier complaints, the second amended complaint alleged broadly that petitioners had discriminated on the basis of race in recruitment, hiring, job assignments, promotions and other employment practices. In addition to its broad allegations of employment discrimination, the second amended complaint, as

did the two earlier complaints, alleged that the relocation of petitioners' administrative headquarters from downtown Detroit to the adjacent city of Dearborn constituted illegal employment discrimination. Paragraph 36 of the second amended complaint alleges:

> "The Defendant's relocation from Detroit, which has a substantial Black population, to Dearborn, which has virtually no Black population and to the suburban Detroit area where there is substantially smaller Black population than there is in Detroit will and does have an adverse, discriminatory impact upon Defendant's Black employees. While approximately four-fifths (4/5) of the Defendant's employees are expected to continue their employment with Defendants at the new location in Dearborn, the vast majority of the employees will not be able to continue their employment due to Defendant's move to the new location, and they are Black and in most instances are Black males. The vacancies created by the inability of Black employees to follow Defendant's move to the new location will not be filled by Blacks, but instead by Whites. Whites and not Blacks will also fill positions created by Defendant's further expansion at the new site."[1]

In February 1971, petitioners announced their plan to build a new administrative headquarters in Dearborn, on a site approximately 10 miles from their Detroit building. Respondents brought this action in December 1972. Although the initial complaint prayed for injunctive relief against the move, the matter was not pursued until March 1974. Then, with petitioners' new administrative headquarters building complete and the transfer of operations to that site underway, respondents sought a preliminary injunction from the district court. Among other things, respondents requested that the court order petitioners to pay black employees overtime pay for time spent traveling to work at the new location, not to take disciplinary action against black employees for tardiness and to provide taxi service for black employees who missed the special bus service petitioners had provided. After a hearing, the court denied the requested injunction because there was no showing of either irreparable harm or the likelihood of success on the merits.

[1] Nearly five years after the relocation of petitioners' administrative offices, petitioners' Fourth Interrogatories asked respondents to name all black employees who were unable to continue their employment because of the relocation. Respondents' answers named only four employees.

In November 1977, respondents proposed to petitioners that petitioners' employees answer a four-page questionnaire devised by respondents. To answer the questionnaire, employees would have to answer questions about transportation to work from December 1970 to the present and also provide information about their families' financial affairs. Petitioners refused to participate.

On March 28, 1978, respondents served on petitioners a pleading entitled "Request for Access to Premises to Conduct A Survey or in the Alternative Plaintiffs' Seventh Interrogatories". Attached to this pleading was a detailed two-page questionnarie which respondents proposed almost all of petitioners' employees be required to answer. The questionnaire is printed in the Appendix at pp 10a-11a. In addition to questions about transportation to work in February 1971 and on the date the employees would fill out the questionnaires, it asked employees to reveal information about living arrangements, home value or rent payments, yearly income of other persons in their households and the like. Petitioners filed objections to respondents' request,

pointing out that neither Rule 34 nor Rule 33 authorized their entry onto petitioners' premises to subject petitioners' employees to these questionnaires.

Respondents then filed with the district court a motion seeking the court's order that they be permitted to enter petitioners' premises to administer their questionnaires. A hearing on this motion was held before Judge Joiner on August 10, 1978, at which time petitioners not only presented their objections to the questionnaires, but presented expert testimony about the technical inadequacies of respondents' proposal. Judge Joiner announced from the bench his intention to require administration of respondents' questionnaires. The order permitting respondents to administer their questionnaires on petitioners' premises during working hours was entered October 20, 1978. In his order, Judge Joiner found that the information sought by respondents "may be relevant" to respondents' claim that the relocation of petitioners' administrative headquarters to Dearborn violated Title VII. The order requires that the following introductory statement be added to the questionnaire:

> "This survey is being administered at the request of the United States District Court for the purpose of helping the court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. *However, for your information, if you do choose not to take part in this survey, it is possible that in the future you may be ordered by the court to present yourself for a more formalized and detailed questioning session. It is the opinion of the court that by filling out this survey, you will be doing your part in aiding the court's search for the truth at a minimum of inconvenience to yourself.*" (Emphasis supplied).

Petitioners filed a timely notice of appeal from the district court's order to the Court of Appeals for the Sixth Circuit. On January 16, 1979, respondents filed a motion to dismiss the appeal as one from an interlocutory order. Petitioners filed their brief in opposition to that motion on January 26, 1979. Petitioners requested that, if the Court of Appeals should agree with respondents and find the order non-appealable, their appeal be considered as a petition for mandamus. In order to comply with Rule 21(a) of the Federal Rules of Appellate Procedure, a copy of the brief was served on Judge Joiner.

On March 12, 1979, the Court of Appeals entered its order dismissing petitioners' appeal as one from an interlocutory order which petitioners could refuse to obey and then seek review after sanctions were imposed. The order rejected petitioners' argument that the district court's order was appealable under 28 USC §1291 as a "collateral" order and also ruled that petitioners were not entitled to review by mandamus.

Although the district court previously denied petitioners' request for a stay of its order pending their appeal to the Court of Appeals, petitioners on March 28, 1979, requested from the district court a stay pending this Court's ruling on this petition. This request was denied on April 4, 1979.

BASIS FOR FEDERAL JURISDICTION

Respondents' Second Amended Complaint asserted jurisdiction under 28 USC §1343(1) and (4), 28 USC §2201 and 28 USC §2202.

REASONS FOR GRANTING THE WRIT

THIS PETITION PRESENTS A NOVEL AND IMPORTANT QUESTION OF FEDERAL PROCEDURE: HAS A DISTRICT COURT THE AUTHORITY TO IMPOSE DISCOVERY PROCEDURES NOT AUTHORIZED BY THE FEDERAL RULES OF CIVIL PROCEDURE?

In reviewing a district court order that a defendant submit to physical and mental examinations under FR Civ P 35, this Court declared in *Schlagenhauf* v *Holder*, 379 US 104, 121 (1964):

> "The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations."

The district court has disregarded the "plainly expressed limitations" of the rules governing pre-trial discovery and has attempted to devise a procedure wholly without precedent in American law. It has ordered petitioners to allow respondents to enter petitioners' premises and administer during business hours a questionnaire to over 1400 of petitioners' employees whom petitioners are ordered to "assemble."

Schlagenhauf, supra, recognized that the formulation of ultimate boundaries for discovery is an appropriate task for this Court.

> "[I]n this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 US 104, 112.

A. The Decision of the Court of Appeals for the Sixth Circuit is in Conflict with a Decision of the Court of Appeals for the Second Circuit.

Respondents' motion for permission to question petitioners' employees asserted that this procedure was authorized either by Rule 33, which governs written interrogatories to a party, or by Rule 34, which governs inspection of documents or tangible things. The district court did not specify which, if any, of the rules governing discovery would sanction the entry onto a party's business premises for the purpose of questioning non-parties. The Sixth Circuit refused to review the district court's order. The Second Circuit, in *Parents' Committee of Public School 19* v *Community School Board,* 524 F2d 1138 (2d Cir 1975), held that an analogous procedure in an action alleging unequal spending of federal funds for bilingual education in public and non-public schools was not discovery authorized by Rule 33. The Second Circuit reversed the district court's order that defendant school board administer a particular language test to its pupils. Contrary to the position taken by the Sixth Circuit, the Second Circuit ruled in *Parents' Committee, supra,* that an order which, although disguised as discovery, compelled a party to follow a procedure not authorized by the Rules was appealable under 28 USC §1291 as a "collateral" order.

B. The Decision of the Court of Appeals for the Sixth Circuit is in Conflict with Decisions of the Courts of Appeals for the Fourth and Seventh Circuits.

The Fourth Circuit recently has held that Rule 34 does not provide the basis for an order permitting a party to enter the premises of another party in order to engage in questioning of employees. In *Belcher* v *Bassett Furniture*

Industries, Inc, 588 F2d 904, (4th Cir 1978), the Fourth Circuit reversed a district court order permitting a Rule 34 inspection of defendant's plant because questioning of employees would occur during the inspection. The order reversed in *Belcher* at least included inspection of the plant and its operations, a procedure authorized by Rule 34. Here, respondents are not interested in inspecting petitioners' premises or operations and the order does not provide for inspection. Questioning of employees in *Belcher* was enough to taint an otherwise legitimate Rule 34 inspection. Here, we have only the taint.

Moreover, Rule 34 does not give the district court authority to order a party to participate in tests or experiments devised by another party. The Seventh Circuit, in *Sladen* v *Girltown, Inc,* 425 F2d 24 (7th Cir 1970), held that a district court was without authority in ordering a plaintiff in a products liability case to test the allegedly defective product. The court wrote:

> "Only Rule 35 of the F.R. Civ. P. gives the district court authority to order examinations and these concern the mental and physical health of a party". 425 F2d 24, 25.

The order of the district court, which the Sixth Circuit refused to review, departs farther from the discovery procedures authorized by the Rules than did the orders reversed in *Parents' Committee, supra, Belcher, supra,* and *Sladen, supra.* The order reversed in *Parents' Committee* required administration of a language test to school children. Here, the order requires that petitioners' employees be questioned, not about their jobs, but about their personal and financial affairs. The order reversed in *Belcher* was defective because it permitted questioning of employees about their jobs during an inspection. Here, the

order is concerned only with questioning, none of which relates to employment. In *Sladen,* the district court erred by ordering under Rule 34 the testing of a physical object. Here, the district court has ordered petitioners to assemble their employees to participate in respondents' experiment.

C. The District Court's Order, by Permitting Respondents to go upon Petitioners' Premises in order to Question Petitioners' Employees about their Private Affairs, a Procedure Not Authorized by Rule 34, Violates both the Property Rights of Petitioners and the Privacy Rights of Petitioners' Employees.

Petitioners pointed out to the district court that to allow respondents to question employees on petitioners' premises would disrupt and interfere with their normal business operations. Such disruption and interference, petitioners argued, would be caused by a procedure not authorized by Rule 34, which only authorizes entry to inspect the premises themselves or any "object" or "operation" located on the premises. Inspection authorized by Rule 34 is not interrogation, and petitioners' employees are not "objects" or "operations".

Of the Federal Rules of Civil Procedure, only Rule 34 deals with entry upon a party's premises. Until the 1970 amendments to the Rules, a showing of "good cause" was the "plainly expressed limitation on the use of that Rule", *Schlagenhauf, supra,* 379 US 104, 118. While the Rule now permits entry onto premises without an order, there is authority for the position that "good cause" still must be demonstrated before a district court can order entry over objections. *Belcher, supra,* and Hughes & Anderson, *Discovery: A Competition Between the Right of Privacy and the Right to Know,* 23 U Fla L Rev 289 (1971). As the Fourth Circuit stated in *Belcher, supra:*

> "Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted." 588 F2d 904, 908.

"Good cause", whether implicitly or explicitly required, reflects Rule 34's accomodation of discovery needs to important property rights.

For the district court to order petitioners to permit respondents to enter their premises, for a purpose not even contemplated by Rule 34, is a serious intrusion upon property rights recognized by the Fourth Amendment. As this Court announced in *See* v *City of Seattle,* 387 US 541, 543 (1967):

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

This Court recently has reaffirmed this position in *Marshall* v *Barlow's, Inc,* 436 US 307 (1978).

An entry supported by "good cause" and for one of the purposes set forth in Rule 34, "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon," would not constitute an unreasonable entry. When the entry is for the purpose of interrogating employees under threat of court sanctions in an experiment totally unauthorized by the discovery rules, it cannot be considered reasonable.

The district court's order also disregards petitioners' employees' interest in privacy. As this Court recognized in *Detroit Edison Co* v *NLRB,* ..... US ....., 47 US LW 4233 (1979), employees' privacy interests are worthy of

protection, even in the face of claims by employee representatives that they need confidential information.

The court's order does not directly order petitioners' employees to disclose to respondents the confidential information requested by the questionnaire. However, the introductory statement which the order requires be placed on the questionnaire is misleading and designed to coerce employees into participation. The introductory statement is coercive because it threatens petitioners' employees. If they are not "cooperative", they can be ordered by the court "to present yourself for a more formalized and detailed questioning session". The implication is they will be hauled before the court and stripped of even more of their privacy.

Employees are not told, as they easily could have been, that as non-parties they may be subpoenaed under Rule 45(d) for deposition, for which they would receive a witness and mileage fee, as provided in 28 USC §1281, and at which they could be represented by counsel who could object to improper questioning. The introduction also misleads employees by implying that if they do answer respondents' questionnaire, they will not be called for additional questioning as either deposition or trial witnesses. Neither respondents nor the court is in any position to make such representation. Additionally, the introduction incorrectly states that the survey is being administered at the request of the district court in a "search for the truth". The fact is the survey proposed is at the request of respondents in an effort to obtain monetary damages against the employer and other relief which may directly and adversely affect those answering the questionnaire. This failure even to mention respondents, taken with the fact that the survey

is to be administered on petitioners' premises during business hours, may lead employees who are aware of this litigation to think that petitioners approve of this intrusion into their private affairs.

The ability of respondents to obtain information which the district court found only "*may* be relevant" without invading petitioners' business premises and without misleading petitioners' employees about their rights emphasizes the violations of the rights to property and privacy sanctioned by the district court. In the course of over six years' massive and pervasive discovery of petitioners' records, respondents have been provided with, *inter alia,* address information for current employees of petitioners. As was done with the class notices, the questionnaires could be mailed to all employees. If this procedure were followed it would have the saving grave of not being contrary to the Rules; be properly identified as the respondents' discovery efforts—rather than the court's; and permit an uncoerced response by employees, instead of requiring from them an instant "yes" or "no", as would be the case if petitioners have to "assemble" them for respondents' convenience. The property rights of petitioners and the personal rights of its employees thus would be preserved and the discovery procedure restored to the limits fixed by the Federal Rules.

This Court, in *NLRB* v *Babcock & Wilcox Co,* 351 US 105 (1956), held that the property rights of owners would prevent union organizers from entering even non-working areas of the plant during non-working hours, if the organizers had available other means of contacting employees. An analogous situation is presented here, and petitioners are entitled to no less protection of their property rights than was accorded the employers in *Babcock & Wilcox, supra.*

Petitioners fully appreciate the normal reluctance of this Court, and even the Sixth Circuit, to concern itself with questions of discovery and trial preparation.

However, the district court's order is not a mere questionable exercise of discretion or a logical extension of some heretofore established construction of the Rules. The court's order is a new exercise of judicial power which ignores both the letter and spirit of the Rules controlling discovery.

The order in question, moreover, is not one which can await the outcome of the case if correction is needed. The injury posed to petitioners and their employees is irreparable. If petitioners do not obtain relief in this Court, they are, for all practical purposes, denied it.

Finally, while petitioners have taken pains to point out some of the difficulties and consequences of the district court's order, as it now reads, it is the concept of the order which is being attacked. The language chosen by the district court simply exacerbates a totally unauthorized act.

CONCLUSION

For the reasons stated above, the writ should be granted.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOROTHY BELL, et al.,
Plaintiffs,

v. Civil Action
AUTOMOBILE CLUB OF MICHIGAN, et al., No. 39309

Defendants.

ORDER

Plaintiffs have filed a motion to compel access to premises to conduct a survey or in the alternative answers to plaintiffs' seventh interrogatories. In this request, plaintiffs are seeking information from all (approximately 1400) of defendants' current employees, both class members and non-class members, about the different effects, if any, upon white and black employees of the relocation of defendants' administrative headquarters from downtown Detroit to the suburb of Dearborn, Michigan.

Based on the briefs, affidavits, expert testimony and oral arguments submitted to the parties, it is ordered as follows:

1. The information sought by plaintiffs may be relevant to the relocation issue in this case. The court finds the survey procedure requested by plaintiffs to be the most reasonable method of proceeding to gather this information and to be preferable to the burdens associated with an effort of trying to literally and individually interrogate each person under oath by deposition.

2. Defendants shall arrange to have employees present at a reasonable time during their working hours for the

purpose of responding to the survey and shall without cost to plaintiffs make an appropriate room available on their premises for the conducting of said survey.

3. Plaintiffs shall pay to AAA the salary and fringe benefits for the time spent by employees in connection with the survey, including that time spent in getting to and from the survey room, but not including the time spent by employees arranging for and coordinating the survey. All other costs must be borne by defendant, and defendant is entitled to no compensation for any interference with its normal operations and member and customer services caused by the survey.

4. If defendants want additional questions included in the survey, they shall work with plaintiffs towards that end, defendants then being responsible for salary and fringe benefits of employees for the appropriate portion of lost time. However, defendants are not required to ask any such questions, and their failure to do so does not preclude them from later challenging the reliability of the survey on the basis, *inter alia,* of failure to include pertinent questions. In addition, defendants may, if they wish, and at their expense, conduct surveys of their own at any time.

5. Copies of the completed survey shall be maintained and made readily available to both parties. If either party desires a protective order for the purpose of assuring privacy relative to the information obtained in this survey, the parties shall try to agree to appropriate provisions and, if they are unable to agree, shall submit proposed protective orders to the court.

6. The survey should be clarified to explain the point in time or date for which answers are being sought. For

example, "as of February 1, 1971" and "as of date of employment if hired after February 1, 1971" should be added where appropriate.

7. There is to be an introduction to the survey which will read as follows:

> "This survey is being administered at the request of the United States District Court for the purpose of helping the court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. However, for your information, if you do choose not to take part in this survey, it is possible that in the future you may be ordered by the court to present yourself for a more formalized and detailed questioning session. It is the opinion of the court that by filling out this survey, you will be doing your part in aiding the court's search for the truth at a minimum of inconvenience to yourself."

8. If a protective order is obtained pursuant to paragraph 5 of this order, the effect of that order is to be included in the introduction to the survey set out above.

9. The parties are directed to cooperate in the execution of this order so that the survey may be taken in the very near future.

So ordered.

CHARLES W. JOINER
United States District Judge

Dated: October 20, 1978
Detroit, Michigan

No. 79-1070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, AFRO-AMERICAN ASSOCIATION, and FOCUS: HOPE, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees

v.

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, MOTOR LAND INSURANCE, and GROUP INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellants

ORDER

BEFORE: WEICK, CELEBREZZE and MERRITT, Circuit Judges

Upon consideration of defendants-appellants' motion to stay pending appeal, the plaintiffs-appellees' motion to dismiss the appeal and the responses and replies submitted in relation thereto,

It appearing from these documents and from the District Court record that the defendants-appellants are attempting to appeal from an interlocutory order allowing

the plaintiffs-appellees to administer a written survey to the appellants' employees; that the appellants will be able to refuse to obey the order and, consequently, prevent any potential harm which may result from administering the survey, and that they would be able to seek review of the order after sanctions are applied, and that, for this reason, the appeal is from an interlocutory order which does not fall within the "small class" of orders which are otherwise appealable under 28 U.S.C. §1291, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Dow Chemical Company* v. *Taylor*, 519 F.2d 352 (1975); Cf. *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366 (6th Cir. 1978); and,

It also appearing that the defendants-appellants have failed to show that exceptional circumstances exist in which their right to a writ of mandamus is clear and indisputable, *Dow Chemical Company* v. *Taylor, supra; In re April 1977 Grand Jury Subpoenas, supra* at 1372;

It is ORDERED that the motion to stay pending appeal be and hereby is denied because there is no threat of irreparable injury, *Hamlin Testing Laboratories, Inc.* v. *U.S. Atomic Energy Commission*, 337 F.2d 221, 222 (6th Cir. 1969); and, it is further ORDERED that the motion to dismiss this appeal be and hereby is granted due to this Court's lack of jurisdiction to entertain this appeal under Rule 9(b) 1, Rules of the Sixth Circuit.

ENTERED BY ORDER OF
THE COURT
John P. Hehman
Clerk

Federal Rules of Civil Procedure
Rule 33.
INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

Rule 34.
PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, draw-

ings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the

part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

NAME_____ DEPARTMENT or BRANCH _____

RACE_____ DATE OF SURVEY_____

For those people first employed at the Auto Club headquarters prior to February 1, 1971, your address at that time was:_____

For those people not employed at the Auto Club headquarters until after February 1, 1971: You first became employed at the headquarters office in (Month)_____(Year)_____, and at that time your address was:_____

I. How did you usually travel to work at that time?

A. DROVE ☐

1. Who did the vehicle belong to?
   - ☐ You (or someone in your household)
   - ☐ AAA
   - ☐ Other *Please specify:*_____
2. Did you usually drive someone else in your household to work on the way?
   - ☐ Yes ☐ No
3. If so, in what geographic area did this person work? *(Be as specific as possible):*_____

B. CAR POOL ☐

1. Were you a driver?
   - ☐ Always ☐ Sometimes ☐ Never
2. Were the other people in the car pool AAA employees?
   - ☐ Yes ☐ No
3. Did you pay money to participate? ☐ Yes ☐ No

C. PASSENGER ☐

1. Was the driver a member of your household?
   - ☐ Yes ☐ No
2. Did the driver go to work after dropping you off?
   - ☐ Yes ☐ No
3. If so, in what geographic area did he/she work? *(Be as specific as possible):*_____
4. Did you pay money for the ride? ☐ Yes ☐ No

D. BUS ☐

1. Which bus line(s) did you take?_____
2. Where did you board the bus? Near the corner of _____ and _____ (give street names)
3. How did you get to the bus stop?
   - ☐ Walked ☐ Drove ☐ Passenger
4. How long did it take you to get to the bus stop? _____ minutes.

E. OTHER ☐ *Please specify:*_____

II. Even if you didn't usually drive to work, was there usually a vehicle available if you wanted it for work?

☐ Yes ☐ No

A. If so, why didn't you usually use it?_____

III. Aside from your usual method of travelling to work, did you ever go by any other method at that time?

☐ Yes ☐ No

A. If so, how?
   - ☐ Drove ☐ Car Pool ☐ Passenger ☐ Bus ☐ Other

B. About how often did you use this second method?
   - ☐ Almost never ☐ Sometimes ☐ Almost half the time

IV. Whether you used the bus or not, at what intersection was the nearest bus stop to your place or residence?_____

A. How many blocks was this from your place of residence?_____

V. Which of the following best describes the building you lived in at that time?

- ☐ Single family home detached from any other house
- ☐ Single family home attached to one or more houses
- ☐ A building for 2 to 4 families
- ☐ A building for 5 to 9 families
- ☐ A building for 10 or more families

VI. Was your residence owned or was it rented by you or your household?

☐ Owned or being bought
- Its value was_____
- Don't know its value ☐

☐ Rented
- The monthly rent was_____
- Don't know monthly rent ☐

☐ Other
- Specify:_____

VII. Altogether, how many people lived in your household, including you?_____

A. How many were under the age of 14?_____

B. Besides yourself, how many people in your household, who were related to you, were employed at that time?_____

Please list each employed person below by giving his/her relationship to you, then fill in the other columns:

Employed persons: Relationship to you?	Area in which he/she worked (e.g. downtown Detroit, Livonia, etc.) Be as specific as possible.	Approximate yearly income (choose one of the categories A-F below)	How did this person get to work? (Bus, Car, Walk, etc.)
1.			
2.			
3.			
4.			
		A. less than $5000 B. $5000-$9999 C. $10,000-$11,999 D. $12,000-$14,999 E. $15,000-$19,999 F. $20,000 or more	

VIII. How many automobiles did you have in your household at that time?_____

NAME_____ DEPARTMENT or BRANCH _____

RACE_____ DATE OF SURVEY_____

For those people presently employed at the Auto Club headquarters in Dearborn: Your present address is:_____

For those people not presently employed at the Auto Club headquarters: You transferred to a branch office or the Legal department in (Month)_____ (Year)_____ and at that time your address was:_____

I. How do you usually travel to work at the present time?

A. DRIVE ☐

1. Who does the vehicle belong to?
   - ☐ You (or someone in your household)
   - ☐ AAA
   - ☐ Other *Please specify:*_____
2. Do you usually drive someone else in your household to work on the way?
   - ☐ Yes ☐ No
3. If so, in what geographic area does this person work? *(Be as specific as possible):*_____

B. CAR POOL ☐

1. Are you a driver?
   - ☐ Always ☐ Sometimes ☐ Never
2. Are the other people in the car pool AAA employees?
   - ☐ Yes ☐ No
3. Do you pay money to participate? ☐ Yes ☐ No

C. PASSENGER ☐

1. Is the driver a member of your household?
   - ☐ Yes ☐ No
2. Does the driver go to work after dropping you off?
   - ☐ Yes ☐ No
3. If so, in what geographic area does he/she work? *(Be as specific as possible):*_____
4. Do you pay money for the ride? ☐ Yes ☐ No

D. BUS ☐

1. Which bus line(s) do you take?_____
2. Where do you board the bus? Near the corner of _____ and _____ (give street names)
3. How do you get to the bus stop?
   - ☐ Walk ☐ Drive ☐ Passenger
4. How long does it take you to get to the bus stop? _____ minutes.

E. OTHER ☐ *Please specify:*_____

II. If you answered the above question differently from question "I" on the other page, approximately when did you change your method of getting to work?
Month_____ Year_____

III. Even if you don't usually drive to work, is there usually a vehicle available if you want it for work?
☐ Yes ☐ No
A. If so, why don't you usually use it?_____

IV. If you answered the above question "yes" but answered "no" to question "II" on the other page, approximately when did you first have a vehicle available for driving to work if you wanted to?
Month_____ Year_____
A. What type of vehicle was it?_____
B. What was the model year of the vehicle?_____

V. Aside from your usual method of travelling to work, do you ever go by any other method?
☐ Yes ☐ No
A. If so, how?
☐ Drive ☐ Car Pool ☐ Passenger ☐ Bus ☐ Other
B. About how often do you use this second method?
☐ Almost never ☐ Sometimes ☐ Almost half the time

VI. Whether you use the bus or not, at what intersection is the nearest bus stop to your place of residence?_____
A. How many blocks is this from your place of residence?_____

VII. Which of the following best describes the building you live in at the present time?
- ☐ Single family home detached from any other house
- ☐ Single family home attached to one or more houses
- ☐ A building for 2 to 4 families
- ☐ A building for 5 to 9 families
- ☐ A building for 10 or more families

VIII. At the present time, is your residence owned or is it rented by you or your household?
☐ Owned or being bought — Its value is_____ ☐ Don't know its value
☐ Rented — The monthly rent is_____ ☐ Don't know monthly rent
☐ Other — Specify:_____

IX. Altogether, how many people live in your household, including you?_____
A. How many are under the age of 14?_____
B. Besides yourself, how many people in your household, who are related to you, are presently employed?_____
Please list each employed person below by giving his/her relationship to you, then fill in the other columns:

Employed persons: Relationship to you?	Area in which he/she worked (e.g. downtown Detroit, Livonia, etc.) Be as specific as possible.	Approximate yearly income (choose one of the categories A-F below)	How did this person get to work? (Bus, Car, Walk, etc.)
1.			
2.			
3.			
4.			
		A. less than $5000 B. $5000-$9999 C. $10,000-$11,999 D. $12,000-$14,999 E. $15,000-$19,999 F. $20,000 or more	

X. How many automobiles do you have in your household at the present time?_____

Questionaire 11a

Supreme Court, U.S.
FILED
MAY 9 1979
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IN THE

Supreme Court of the United States

No. 78-1542

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTERINSURANCE EXCHANGE, MOTOR LAND INSURANCE AND GROUP INSURANCE COMPANY OF MICHIGAN,

Petitioners

VS.

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE AND HENRY SWIFT, individually and on behalf of all persons similarly situated,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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No. 78-1542

AUTOMOBILE CLUB OF MICHIGAN, DETROIT AUTOMOBILE INTERINSURANCE EXCHANGE, MOTOR LAND INSURANCE AND GROUP INSURANCE COMPANY OF MICHIGAN,
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vs.

DOROTHY J. BELL, SHIRLEY J. SIMS, KATEY WEATHERSPOON, MARTHA COWAN, ANITA PRYSOCK, LILLIE YARBOROUGH, DAVID ADAMS, CHARLES HALL, DWIGHT T. SMITH, JOHNNIE GREEN, JAMES CASTELLE AND HENRY SWIFT, individually and on behalf of all persons similarly situated,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

OPINIONS BELOW

On August 10, 1978, the District Court of the Eastern District of Michigan entered an order granting respond-

ents' discovery request for petitioners to answer interrogatories or permit access to the petitioning employers' premises for purposes of administering a professionally developed questionnaire to petitioners' employees. The verbal findings of the District Court were announced at the hearing and thereafter an order was entered. The order of the District Court is reported unofficially at 18 FEP Cases 970.[1]

The Court of Appeals for the Sixth Circuit by order dated March 12, 1979, dismissed the petitioners' appeal as an interlocutory discovery order, observed that petitioners could avoid any potential harm by refusing to obey the order and seeking review after sanctions are applied, and refused to issue the requested writ of mandamus since petitioners had failed to show the existence of exceptional circumstances. Both the District Court's and the Court of Appeal's orders are reprinted in the appendix to the petition at pp 1a-3a and 4a-5a.[2]

JURISDICTION

The petitioner's invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) or alternatively under 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit act properly in dismissing the petitioners' extraordinary method for seeking review of a discovery order, particularly when the ordered discovery is still subject to further

[1] The District Court on January 9, 1979, refused to certify its order under 28 U.S.C. § 1292(b) or to stay the taking of the survey pending appeal.

[2] The Court of Appeals denied petitioners' request for a stay pending appeal. Thereafter the District Court denied the petitioners' request for a stay pending the resolution of the instant petition as did Justice Stewart on April 10, 1979.

modifications by the District Court and when the attempted appeal predates the imposition of sanctions by the Court.

2. Whether the District Court acted within its authority in ordering an on-premises employee survey.

STATUTES AND RULES INVOLVED

The statutes involved are §§ 28 U.S.C. 1254(1), 1291, and 1651. The Federal Rules involved are Rules 26b(1), 26(c), 33 and 34 of the Federal Rules of Civil Procedure. The pertinent text of these statutory provisions and rules are contained in the Appendix at pp 1a-2a. See also petition appendix pp 6a-9a.

STATEMENT OF THE CASE

This case involves a certified class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-*et seq.* as amended and Section One of the Civil Rights Act of 1966, as amended, 28 U.S.C. § 1981. The complaint as amended alleges that petitioner ("AAA") has engaged in and is engaging in a broad pattern of racial discrimination in violation of Title VII and § 1981. Among other things, the complaint alleges that the move of AAA's corporate headquarters from downtown Detroit to a suburban location in Dearborn, Michigan, would have an unlawful discriminatory impact upon blacks.[3]

The continuing adverse impacts alleged in the complaint include, *inter alia*, the following:

[3] Petitioners announced to their employees the decision to relocate their headquarters employing approximately 1,200 persons to the Dearborn site, on or about February 1, 1971. The relocation occurred in April and May of 1974.

1) Blacks would not be able to continue their employment with AAA at the new location to the same extent as white employees.

2) The relocation would impose greater travel or other economic burdens upon black employees than white employees.

3) The new location would place potential black employees at a competitive disadvantage to potential white employees.

In order to flush out the extent of these differing alleged impacts, respondents under the supervision of John Kain, Chairman of the Department of City and Regional Planning, Harvard University, Cambridge, Massachusetts, and Susan Smock, Professor of Urban Planning and Co-administrator of Research, Wayne State University, Wayne State Center for Urban Studies, Detroit, Michigan developed an employee questionnaire. As detailed in the materials considered by the District Court, the survey (questionnaire) requires written answers, seeks objective rather than attitudinal responses and does not entail employee interviews.[4]

The employee information requested in the survey falls generally into the following categories:

1) data pertaining to employee transportation—primarily the employee's mode(s) of travel to and from work, and verification of addresses information; and

2) data pertaining to the employee household.

As reflected in the record, a major reason for the transportation information requested in the survey is to enable respondents to identify the differing effects of the relocation by ascribing appropriate employee travel times and changes in those times or to identify differing cost im-

[4] The survey appears as an attachment to the petition pp. 10a-11a.

pacts associated with the relocation such as the necessity for employee class members previously dependent upon public bus transportation to purchase cars. The household and background information is requested to enable respondents' experts to describe and address through appropriate multi-variate analysis the extent to which the alleged adverse transportation burdens imposed on class-members may be attributed to AAA's relocation.[5]

After considering briefs, oral arguments, affidavits of respondents' experts and management representatives of petitioners and hearing trial testimony of petitioners' experts, the District Court announced its findings and thereafter entered an order. The District Court's order included in pertinent part the following findings and procedures:

1. The information sought by plaintiffs may be relevant to the relocation issue in this case. The Court finds the survey procedures requested by plaintiffs to be the most reasonable method of proceeding to gather this information and to be preferable to the burdens associated with an effort of trying to literally and individually interrogate each person under oath by deposition.

* * * *

2. Defendants shall arrange to have employees present at a reasonable time during their working hours for the purposes of responding to the survey and shall without cost to plaintiffs make an appropriate room available on their premises for the conducting of said survey.

* * * *

[5] The materials and briefs considered by the Court also reflect that there exists no satisfactory alternative documentary base of AAA's from which the information requested in the survey can be constructed.

7. There is to be an introduction to the survey which will read as follows:

> This survey is being administered at the request of the United States District Court for the purposes of helping the Court understand more about the employees of the Automobile Club. No one is being ordered to answer any of the questions in the survey; each of you is free to refuse to take part. However, for your information, if you do not choose to take part in this survey, it is possible that in the future you may be ordered by the Court to present yourself for a more formalized and detailed questioning session. It is the opinion of the Court that by filling out this survey, you will be doing your part in aiding the Court's search for the truth at a minimum of inconvenience to yourself.

Under other provisions of the order respondents are required to reimburse petitioners for the time spent by employees in connection with the survey, petitioners may add questions to the survey, and petitioners are not barred from conducting their own survey. In addition, the District Court indicated that it would entertain further protective orders.

Thereafter, the Court of Appeals dismissed as interlocutory the petitioners' appeal and request for a writ of mandamus.

The District Court is currently considering requests by counsel concerning procedures and protective conditions for the survey including *inter alia* modifications in the notices to the employees and the confidentiality of survey responses. As indicated by affidavits of petitioners' management, the survey can not be conducted of the 1,200 plus employees *en masse*, but instead will occur in its training room which can only accommodate a group of 50-60 employees at any one time.

REASONS FOR OPPOSING THE WRIT

THE PETITION SEEKS REVIEW OF AN INTERLOCUTORY DISCOVERY ORDER AND DOES NOT CONCERN AN APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH WARRANTS REVIEW

This Court should deny the instant petition in keeping with its regular practice of rejecting petitions for certiorari review of interlocutory orders. *Cobbledick* v. *United States*, 309 U.S. 323, 325-325 (1940), *Hamilton-Brown Shoe Co.* v. *Wolf Bros & Co.*, 240 U.S. 251, 258 (1916). Like virtually every other discovery order, the District Court's discovery order permitting respondents to conduct an employee survey (questionnaire), constitutes merely a step toward full disposition on the merits, and as such, can not even under a "practical construction" of finality fit within that small category of orders permitted interlocutory review under the "collateral order doctrine." *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949) and *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 155 (1974).

The District Court's order does not even meet the first of this Court's requirement for appealability. As explained in the *Eisen, supra* at 417 U.S. at 171:

> This Court held the order [in the Cohen case] appealable on two grounds. First, the District Court's finding was "tentative, informal or incomplete."

Here, various procedures, relative burdens, and terms with regard to the use of the data are not yet resolved and as such petitioner's contended potential harms are not defined. This is particularly true in regard to matters relating to the confidentiality of employee responses.[6]

---

[6] Manifestly, petitioner's alleged concern for the privacy interests of its employees, in addition to being specious since employees are not even compelled to answer the questionnaire, is clearly premature.

The need for clarity, and definition of the consequences of ordered discovery, however, is an elementary theme in the long line of cases pre-conditioning appellate review of discovery orders upon the prior imposition of sanctions. *Dow Chemical* v. *Taylor*, 519 F.2d 352, 354 (6th Cir. 1975), *cert. den.* 423 U.S. 1033; *Grinnell Corp.* v. *Hackett*, 519 F.2d 595 (1st Cir. 1969), *cert. den.* 423 U.S. 1033 (1975); *Arthur Anderson Co.* v. *Finesilver I*, 546 F.2d 338 (10th Cir. 1977) *cert. den.* 429 U.S. 1096; *Xerox Corp.* v. *SCM Corp.*, 534 F.2d 1031 (2nd Cir. 1976); *American Express Warehouseman Ltd.* v. *Trans American Ins. Co.*, 380 F.2d 277 (2nd Cir. 1967); *Borden* v. *Sylk*, 410 F.2d 843-845 (3rd Cir. 1969); *Lawyers* v. *North Carolina Board of Examiners*, 588 F.2d 547 (4th Cir. 1976). Any other result encourages the undesirable and "debilitating effects on judicial administration caused by piecemeal" review. *Eisen, supra* at 171.

Nor can review of the District Court's survey order be considered "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen, supra* at 546-547. The District Court's survey order was not entered in a vacuum; instead, the order represents the by-product of the District Court's assessment of the data requested in the survey, in terms of both its relative importance to plaintiff's case, and of the relative burdens associated with obtaining that information. A review of the verbal rulings of the District Court at the hearing on August 10, 1978 would leave little question that in ordering the survey the District Court considered the cogency of the requested information to the underlying cause of action as well as the burdens and inconveniences associated with the survey as well as those presented by alternative forms of discovery.[7]

[7] For example: At Tr. 77 Judge Joiner noted that under the Discovery Rules, "Rules 26-37", he was to "look at whether the particular information is relevant to the subsequent [subject] matter involved in the pending action." In addition at Tr. 78, he explained

> So I think the judgment of the Court should be directed at the question of what is proposed here. Seems to be a reasonable and even perhaps, the most reasonable method of proceeding in an effort to gather information that will provide a basis for conclusions for the assistance of the fact finder.
>
> I think the record shows that such a survey would be helpful in a case of this kind . . . that it would probably be the best way to proceed in an effort to gather information of value to the ultimate fact finders in the case.
>
> * * * *
>
> It seems to me that it's preferable to an effort to try to literally and individually interrogate each person under oath by deposition or on the stand.

Consider also the District Court's parenthetical observation in response to questions of petitioners' counsel. ". . . I want to talk to these employees about the transportation problem . . .".

Admittedly, this Court by way of mandamus review under 28 U.S.C. § 1651, has indicated a willingness in extraordinary circumstances to formulate the necessary guidelines for the construction and application of the Federal Rules of Civil Procedure. *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). The occasions for doing so however have been few and far between. The precedent significance of the District Court's order permitting an on-premises survey which does not even compel any employee to answer any of the questions but urges cooperation in the interest of justice is readily distinguishable from the judicial administration and discovery implications of an order such as that at issue in the *Schlagenhauf, supra*, where there existed serious "untoward results" if this Court did not formulate the limits for permitting physical and mental examinations of a defendant party.

Thus, Justice Goldberg explained at p. 122: "To hold otherwise would mean that such examinations could be ordered routinely in automobile cases" and in f.n. 18 he even highlighted the magnitude of the problem by citing

statistics reflecting the massive incidence of automobile accidents and related negligence litigation. 329 U.S. 121-122. The incidence of on-premises survey orders similar to those required in this case by the District Court can not realistically be expected to occur in appreciable numbers particularly when the ground rules of the survey require the respondent employee class representatives to reimburse the petitioner for the wages of the employees for the time spent in assembling and responding to the questionnaire.

A. The Decision of the Court of Appeals for the Sixth Circuit is Not in Conflict With the Decision of the Court of Appeals for the Second Circuit

Without reference to any of the long lines of cases which require the imposition of sanctions before permitting interlocutory review of discovery matters under 28 U.S.C. § 1291, *supra* p. 6, petitioners assert that the Court of Appeals decision for the Sixth Circuit in this case is in direct conflict with the decision of the Second Circuit in *Parents Committee of Public School 19* v. *Community School Board*, 524 F.2d 1138 (2d Cir. 1975) and further erroneously represent that the decision holds that a discovery order which compelled a party to follow a procedure not authorized by the Rules is appealable under 28 U.S.C. § 1291 as a "collateral order". In point of fact, *Parents Committee*, *supra*, does not present a conflict.

The majority opinion in that case, recognized that the lower court's order requiring the testing of school children mandatorily imposed relief sought by the plaintiffs in their complaint, as such assumed the character of a mandatory injunction, and would be reviewable under 28 U.S.C. § 1292(a)(1) after remand for the purpose of taking further evidence and entering of appropriate findings of facts and conclusions of law. 524 F.2d at 1141-1142. Although the concurring opinion in *Parents Committee*, *supra*, supports appellate review under § 1291, the

concurring opinion specifically recognizes that the majority opinion based appellate jurisdiction on 28 U.S.C. § 1292(a)(1) and not on § 1291.[8] 524 F.2d at 1143.

B. The Decision of the Court of Appeals for Sixth Circuit is Not in Conflict With Decisions of the Fourth and Seventh Circuits

Contrary to the petitioner's contention, the recent decision in *Belcher* v. *Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978) does not establish as a principle of law that an on-premises survey or questioning of employees is not authorized under Rule 34 of the Federal Rules of Civil Procedure. The *Belcher* decision disallowed the taking of an on-premises inspection and questioning of employees due to what the Fourth Circuit considered was an improvidently granted order, lacking both precision and care in the formulation of appropriate protective conditions. *Belcher*, *supra*, p. 911. Therefore, the Fourth Circuit held that the district court had not provided the employer with adequate protection and remanded the case for further consideration by the district court. In short, the *Belcher* decision does not create a conflict in the Circuits, is limited to the circumstances of that case and the conclusion that there had not been an adequate balancing by the district court of the relevancy and need for the information sought against the burdens associated with the survey in that case.

Unlike the claim asserted by the employer in *Belcher*, *supra*, p. 907, the administration of respondents' written

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[8] Since the granting of respondent's request for a survey is not encompassed within the injunctive relief sought in the complaint to correct the alleged unlawful racial discrimination, petitioners were not able to frame their request for appellate review to the Court of Appeals for the Sixth Circuit upon the statutory alternative provided under 28 U.S.C. § 1292(a)(1). See *Carr* v. *Monroe Mfg.*, 431 F.2d 304, 386-87 (1970) *cert. den. sub nom., Aldridge* v. *Carr*, 400 U.S. 1000 (1971).

questionnaire does not present the safety hazards of an unstructured on-site inspection and the at-random, unstructured personnel interrogation of employees while working on a complicated factory assembly line by a roaming entourage free to ask questions not previously approved by the District Court. By contrast, the ordered survey consists of a professionally developed written questionnaire approved by the District Court after having fully evaluated the competing needs of the respondents and the alleged burdens of the petitioners. In addition the District Court's order is formulated with precision and further indicates that additional protective conditions may be needed. Finally, review of the record would demonstrate that petitioners are in no position to make the claims permitted the employer in *Belcher*, *supra*, under Rule 26(c) against "annoyance, embarassment, oppression or undue expense." [9]

Sladen v. *Girltown, Inc.*, 425 F.2d 24 (7th Cir. 1970) relied upon by petitioners, also is not in conflict with the order of the Sixth Circuit in this case. While the Seventh Circuit in the *Sladen* case held Rule 35 Federal Rules of Civil Procedure and not Rule 34 gives a district court authority to order physical examinations, it also specifically ruled that under Rule 34 a district court has the authority to require production on a showing of good

[9] Review of the record would reflect that petitioners have themselves conducted similar surveys of all employees at their administrative headquarters prior to the relocation to collect employee transportation information. Similarly, petitioners until recently have requested of applicants for employment household information similar to that requested in the survey. These surveys and/or materials and their limited value to respondents were discussed in full in either briefs or affidavits submitted to the District Court.

Although not yet approved by the District Court, the actual procedure for surveying employees will undoubtedly minimize the contended disruption of the respondent insurance companies' operations with employees being scheduled for questioning in their training room described in affidavits submitted to the District Court by representatives of the petitioners' personnel office.

cause to permit the moving party to conduct tests. Sladen, *supra*, p. 25. Here, the District Court has not forced the opposing party to conduct tests; instead it has required the production and assembly of employees to permit them the option of answering written questions and leaves to the moving party, the respondent, the actual administration of the questionnaire.

C. The District Court Acted Within Its Authority Under The Federal Rules of Civil Procedure

This Court should also not review the order requiring the survey at this time since the District Court acted within its authority. Respondents request was framed as interrogatories under Rule 33 or alternatively under Rule 34 for access to the premises. The case law under Rule 33 indicates that defendants in civil rights litigation under Title VII of the Civil Rights Act of 1964 have been required to conduct surveys to obtain or gather basic information about the work force requested by plaintiffs. See *e.g.*, *Flores* v. *Local 25, IBEW*, 14 FEP Cases 494 (E.D.N.Y. 1976). CF: *Burns* v. *Thiokol Chemical Corporation*, 483 F.2d 300 (5th Cir. 1973). Similarly, under Rule 34 on-premises surveys have been ordered which allowed experts to enter and live in a prison and conduct examinations of prison staff and inmates in litigation involving important civil rights. *Morales* v. *Truman*, 59 FRD 157 (E.D. Tx. 1972). In sum, closer examination of the relevant case law and guidelines under the Federal Rules of Civil Procedure will sustain the authority of the District Court in the circumstances of this case in ordering the respondents to make their premises and employees available so that petitioners might administer to the willing employees the desired survey.

CONCLUSION

For the reasons stated above, the petitioned for writs should be denied.

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APPENDIX

Federal Rules of Civil Procedure
Rule 26
DEPOSITIONS AND DISCOVERY

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * *

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party

seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery by conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Statutes

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) Any alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June

25, 1948, c. 646, 62 Stat. 929; October 31, 1951, c. 655, § 48, 65 Stat. 726; July 1, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.